Supreme Court, U.S.
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In The

Supreme Court of the United States

JOSEPH CHONTOS,

Petitioner,

v.

MARY BERGHUIS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the statutorily mandated use of acquitted conduct to score mandatory sentencing guidelines violate a criminal defendant's Sixth Amendment right to trial by jury?

2. Does the Sixth Amendment right to jury trial apply to a sentencing scheme where the statutory guidelines for crimes punished by any term of years or life determine the minimum sentence and the maximum sentence?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Opinion Below 1

Jurisdiction 1

Constitutional Provision Involved 1

Statement of Facts 2

Reasons for Granting the Petition 5

Conclusion 13

INDEX FOR APPENDIX

Sixth Circuit Opinion ..... App. 1

U.S. District Court Opinion ..... App. 7

Sixth Circuit Order Denying Rehearing En Banc ..... App. 24

Michigan Sentence Guidelines Excerpt ..... App. 25

Trial Court Sentencing Transcript ..... App. 29

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 446 (2000).....7, 8, 9, 12

Blakely v. Washington, 542 U.S. 296 (2004).....*passim*

Chontos v. Berghuis, 585 F.3d 1000 (6th Cir. 2009).....1

McMillan v. Pennsylvania, 477 U.S. 79 (1986).....12

People v. Babcock, 666 N.W.2d 231 (Mich. 2003).....11

People v. Drohan, 715 N.W.2d 778 (Mich. 2006)....10, 11

United States v. White, 551 F.3d 381 (6th Cir. 2008).....8, 9

CONSTITUTIONAL PROVISIONS

Sixth Amendment.....*passim*

STATUTES

28 U.S.C. § 1254(1).....1

Mich. Comp. Laws § 750.520b(2).....3, 10

Mich. Comp. Laws § 769.34(3).....11

Mich. Comp. Laws § 777.1 11

Mich. Comp. Laws § 777.16y.....3

Mich. Comp. Laws § 777.41(2)(a).....6

Mich. Comp. Laws § 777.43(2)(a).....6

Mich. Comp. Laws § 777.62 .....3, 11

Mich. Comp. Laws § 791.233b.....11

OPINION BELOW

The Sixth Circuit Court of Appeals selected its opinion for publication in the Federal Reporter. It is published at 585 F.3d 1000 (6th Cir. 2009) [*Chontos v. Berghuis*]. App. 1-6. The District Court did not report its opinion in F. Supp. 2d, but it can be found at 2007 WL 4326840 (E.D. Mich.). App. 7-23.

JURISDICTION

The Sixth Circuit filed its decision on November 10, 2009 and entered an order denying petitioner's motion for rehearing on January 12, 2010. App. 1-6, 24. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment to the United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF FACTS

Petitioner Chontos's case before this court arose out of two criminal cases consolidated for trial and all post-conviction proceedings. For the purposes of this Petition, the focus is on the counts involving sexual penetration. The charges, jury verdicts, and eventual sentences are summarized below.

Case No. 02-07853

Charges	**Jury Verdict**
1st Degree Criminal Sexual Conduct (penetration)	guilty
1st Degree Criminal Sexual Conduct (penetration)	guilty
1st Degree Criminal Sexual Conduct (penetration)	NOT GUILTY
1st Degree Criminal Sexual Conduct (penetration)	NOT GUILTY
2nd Degree Criminal Sexual Conduct (touching)	guilty
3rd Degree Criminal Sexual Conduct (penetration)	NOT GUILTY
3rd Degree Criminal Sexual Conduct (penetration)	NOT GUILTY
Distributing obscene matter to a minor	guilty

In case No. 02-07853, the prosecutor charged Chontos with perpetrating 6 counts involving sexual

penetration. The jury acquitted Chontos of 4 penetration counts, convicting him of only 2 counts involving penetration. Based on the jury's verdict alone, Chontos's Michigan sentencing guideline range was from 81-135 months to any term of years. Contrary to the Sixth Circuit's opinion, life imprisonment was not an available sentencing option in this case.[1] The trial judge sentenced Chontos to 225 months to 40 years on the two penetration counts, almost double what he would have received if he had been sentenced based on the jury verdict alone. App. 48.

Case No. 02-09913

Charges	**Jury Verdict**
1st Degree Criminal Sexual Conduct (penetration)	NOT GUILTY
1st Degree Criminal Sexual Conduct (penetration)	NOT GUILTY
1st Degree Criminal Sexual Conduct (penetration)	NOT GUILTY
1st Degree Criminal Sexual Conduct (penetration)	NOT GUILTY
1st Degree Criminal Sexual Conduct (penetration)	NOT GUILTY
2nd Degree Criminal Sexual Conduct (touching)	guilty

[1] In Mich. Comp. Laws § 750.520b(2) the punishment is life OR any term of years Criminal Sexual Conduct in the First Degree is a Class A felony [Mich. Comp. Laws § 777 16y]. In the sentencing grid for Class A offenses, life imprisonment was not an available sentencing option for Chontos [Mich. Comp. Laws § 777.62].

In case number 02-09913, prosecutor charged Chontos with perpetrating 5 counts involving sexual penetration. The jury acquitted Chontos of ALL 5 penetration counts. Based on the jury's verdict alone, Chontos's sentencing guideline range for 2nd Degree Criminal Sexual Conduct (no penetration) was from 19-38 months to 15 years. The trial judge sentenced Chontos to 60 months to 15 years, almost double what he would have received if sentenced in accord with the jury's verdict. App. 48.

Procedural history

Petitioner Chontos timely appealed these consolidated cases to the Michigan Court of Appeals. On July 29, 2004, the Court of Appeals issued an unpublished opinion affirming his convictions and sentence. *People v. Chontos*, Nos. 256919/246884 (Mich. Ct. App. 2004). Petitioner Chontos filed a Motion for Reconsideration in light of *Blakely v. Washington*, 542 U.S. 296 (2004). The Court of Appeals denied reconsideration on September 10, 2004. Petitioner Chontos applied for leave to appeal in the Michigan Supreme Court for the connolidated cases. On April 26, 2005, the Supreme Court denied Chontos's application. *People v. Chontos*. Nos. 127160/127161 (Mich. S. Ct. 2005).

On July 6, 2006, petitioner Chontos filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan. On December 10, 2007, the District Court issued an opinion and order denying Habeas Corpus Petition

and granting in part a certificate of appealability. App. 7-23. On January 8, 2008, he filed a Notice of Appeal from the District Court's decision on January 2, 2008. Then Petitioner filed a Motion for a Certificate of Appealability on the claim not certified by the District Court. On August 8, 2008, the Sixth Circuit granted that motion and issued an order allowing Petitioner to raise both issues on appeal. The Sixth Circuit issued a decision affirming the District Court's denial of his writ of habeas corpus on November 10, 2009 and denied petitioner's motion for rehearing on January 12, 2010. App. 1-6, 24.

REASONS FOR GRANTING THE PETITION

I.

Michigan's mandatory sentencing guidelines require the judge to use acquitted conduct when calculating the penetration offense variables for criminal sexual conduct. The jury acquitted Petitioner of nine out of eleven counts involving penetration. The use of the acquitted action substantially increased the offense variable score and raised Petitioner's guidelines sentencing range beyond that authorized by the jury's verdict. This violated Petitioner's Sixth Amendment right to jury trial.

In *Blakely v. Washington,* 542 U.S. 296 (2004), this Court extensively discussed the Sixth Amendment right to a jury trial and its impact on factual findings

used to sentence criminal defendants. This Court said, "When the judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment' and the judge exceeds his proper authority." *Id.* at 304. This Court emphasized that fact finding is the province of the jury and that the role of the jury must be preserved. The Framers of the Constitution put the jury trial guarantee in there because they were "unwilling to trust the government to mark out the role of the jury." *Id.* at 309. Petitioner's case is a perfect example of how Michigan law demotes the role of the jury to a mere formality and by doing so violated Petitioner's Sixth Amendment right to a jury trial.

In criminal sexual conduct cases like Petitioner's, Michigan law requires judges to disregard a jury's credibility assessment and fact finding when determining a defendant's sentence under the mandatory sentence guidelines. In the sentencing guidelines for criminal sexual conduct cases, the statutory instructions for Offense Variable 11 [Mich. Comp. Laws § 777.41(2)(a)] and Offense Variable 13 [Mich. Comp. Laws § 777.43(2)(a)] mandate that the judge use acquitted conduct when scoring the offense variables for sexual penetrations. App. 25-28. When scoring Petitioner's sentencing guidelines, the trial judge used the 9 acquitted penetration counts to significantly increase the scores for Offense Variables 11 and 13. This resulted in a significantly longer sentence. Both the trial court and the prosecutor brushed

aside defense counsel's objections to using acquitted conduct by saying that the jury's verdict did not matter. App. 32-33, 45-46. The prosecutor summed up what Michigan law is regarding acquitted conduct: "whether or not he is convicted doesn't really matter. What matters is whether the court after hearing the testimony here, believes by a preponderance of the evidence that there was sufficient evidence for this Court to find that there were two or more penetrations." App. 32. In addition, the trial judge disagreed with the jury's credibility determination by saying: "[T]he court has also sat through the entire trial, which was lengthy, and I don't believe that any person who sat through this trial, with an impartial mind towards the circumstances, could in any way disbelieve these children." App. 45-46. So not only did the judge disregard the jury's verdict and use acquitted conduct, but she also dismissed the jury's credibility assessment by finding that no one could disbelieve the witnesses. Michigan's degradation of the jury's role violated Petitioner's Sixth Amendment right to jury trial as this Court has explained it in *Blakely*.

In *Blakely*, this Court said it needed to "give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id.* at 305-306. "*Apprendi* carries out this design by ensuring that the judge's authority to

sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." *Id.* at 306. This Court warned that if *Apprendi*'s [*Apprendi v. New Jersey*, 530 U.S. 466 (2000)] approach to the Sixth Amendment jury trial right was rejected that the "jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish." *Id.* at 306-307. In Petitioner's case, the trial judge disregarded the jury's verdict, made her own credibility determination, and then sentenced him based upon the judge's facts thus relegating his right to jury trial to a mere formality. Michigan law decouples the facts found by the jury from the facts used to determine a defendant's sentence. If the role of the jury is to act as a "circuit-breaker in the State's machinery of justice," then the Sixth Circuit as well as the Michigan courts unreasonably applied established Supreme Court law in Petitioner's case.

The Sixth Circuit panel relied on *United States v. White,* 551 F.3d 381 (6th Cir. 2008) as controlling on the issue of using acquitted conduct to score sentence guidelines. This reliance is misplaced because *White* involved the *advisory* federal sentencing guidelines. "To say that district court judges may enhance a defendant's sentence based on acquitted conduct, however, is not to say that they *must* do so." (Emphasis in original) *Id.*, at 386. Petitioner's case is

different because it involves mandatory sentencing guidelines that require a judge to use acquitted conduct. As Judge Merritt said in his dissent in *White*, "punishment for acquitted conduct poses unique constitutional problems and must be avoided." *Id.*, at 387. This is especially so when a judge is required by statute to use acquitted conduct in setting a sentence.

Petitioner Chontos's case presents this Court with an opportunity to address the issue of whether mandated use of acquitted conduct to score mandatory sentencing guidelines violates the Sixth Amendment right to trial by jury.

II.

For Class A felonies, the Michigan sentencing guidelines provide a minimum range and determine whether the maximum sentence – life imprisonment – applies to a defendant. These mandatory sentencing guidelines should be included within the definition of "statutory maximum" set forth in *Blakely*. Since Michigan's statutory sentencing guidelines downgrade the jury to a formality, it violates the Sixth Amendment's right to jury trial and this Court's holdings in *Apprendi* and *Blakely*.

This case also presents the issue of whether the Michigan sentencing guidelines should be included in the term "statutory maximum" as described in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and

Blakely, supra. It makes sense to apply the reasoning of the *Apprendi/Blakely* cases to a sentencing scheme where the statutory guidelines determine the minimum sentence and also the maximum sentence when the statute has any term of years or life as the punishment. In *Blakely*, this Court rejected Washington's claim that the statutory maximum was 10 years, which is what the statute said it was. Instead, this Court said that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, U.S. at 303 [emphasis in the original]. But Michigan interprets the term "statutory maximum" as whatever the statute says it is. See *People v. Drohan*, 715 N.W.2d 778, 791 (Mich. 2006). The Sixth Circuit panel in this case found that the "statutory maximum" was "imprisonment for life or any term of years" citing Mich. Comp. Laws § 750.520b(2). If the Blakely definition of "statutory maximum" is applied to the Michigan statutory sentencing guidelines, then the statutory maximums should be the sentence that the judge may impose based solely upon the facts reflected by the jury's verdict. In Petitioner's case, that interpretation would mean that he should have been scored for only two sexual penetrations and that Petitioner's sentences would have been substantially less.

The Michigan Supreme Court believes that *Blakely* does not apply to the Michigan sentencing guidelines because Michigan has "indeterminate"

sentencing scheme. *Drohan*, supra. But this is disingenuous. Michigan is no longer a true "indeterminate" sentencing state. It was one until the Michigan Legislature enacted statutorily mandated sentencing minimums via mandatory sentencing guidelines [Mich. Comp. Laws § 777.1 et seq.] and required defendants to serve their minimum sentence [Mich. Comp. Laws § 791.233b]. Now judges must plug facts into legislatively defined prior record variables and offense variables to come up with a score that tells them what minimum sentence to give to a defendant within a narrow range prescribed by the guidelines.[2] Once the minimum sentence is set, then the maximum sentence can be set. The presence or absence of certain facts is now the driving force behind what sentence a defendant receives, not judicial discretion. It is the shift to legislatively defined facts used for sentencing that changed Michigan from a true indeterminate sentencing state to a sentencing scheme subject to this Court's decision in *Blakely*.

Petitioner's case involves a Class A felony where the possible sentence is life or any term of years. For Class A felonies, the statutory sentencing guidelines determine whether a defendant can receive the maximum punishment – life imprisonment. See Mich. Comp. Laws § 777.62. The life sentence is not available as a possible sentence until the guidelines scores

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[2] Departures from the guidelines are heavily discouraged both by statute and case law. Mich. Comp. Laws § 769.34(3); *People v. Babcock*, 666 N W.2d 231 (Mich. 2003).

reach extremely high offense variable levels coupled with very high prior offense variable levels. This means that for Class A felonies, how the mandatory guidelines are scored determines both the minimum and maximum sentence that a defendant receives. This is not a true indeterminate sentencing scheme.

The facts and statutes at issue in this case call into question the continuing viability of *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) in light of *Apprendi* and *Blakely*. In *McMillan*, Pennsylvania law allowed the judge to make the determination of aggravating facts not presented to the jury that then increased a defendant's sentence. Michigan's sentencing law is even worse because it requires a judge to disregard the jury's determination of the facts and witness credibility when scoring the guidelines for certain offenders, thus greatly increasing their sentences beyond that authorized by the facts encompassed in the jury's verdict. Michigan's sentencing scheme should not be beyond the reach of the Sixth Amendment's right to jury trial and this Court's holdings in *Apprendi* and *Blakely*.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPH CHONTOS, *Petitioner-Appellant,* v. MARY BERGHUIS, *Respondent-Appellee.*	No. 08-1031

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-13049 – Victoria A. Roberts, District Judge.

Argued: June 11, 2009

Decided and Filed: November 10, 2009

Before: BATCHELDER, Chief Judge;
BOGGS and COOK, Circuit Judges.

COUNSEL

ARGUED: Rosemary Gordon Pánuco, Law Office, Tucson, Arizona, for Appellant. Janet A. Van Cleve, Michigan Attorney General's Office, Lansing, Michigan, for Appellee. **ON BRIEF:** Rosemary Gordon Pánuco, Law Office, Tucson, Arizona, for Appellant.

Raina Korbakis, Office of the Michigan Attorney General, Lansing, Michigan, for Appellee.

OPINION

COOK, Circuit Judge. A jury found Joseph Chontos guilty of violating several laws. His most serious offense – first-degree criminal sexual conduct involving a person under the age of thirteen – carried a maximum statutory penalty of "imprisonment for life or any term of years." Mich. Comp. Laws § 750.520b(2)(b). The Michigan trial court imposed a 40-year maximum sentence and a 225-month minimum. Chontos appealed his conviction and sentence in Michigan's courts to no avail.[1]

Chontos then turned to the federal courts, seeking a writ of habeas corpus on the grounds that: (1) the Michigan trial court violated his Sixth Amendment jury trial right by finding facts at sentencing that raised his minimum sentence; (2) the trial court violated both his Fifth and Sixth Amendment rights

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[1] The parties contest whether Chontos exhausted his state remedies – an issue we need not resolve because we deny relief on the merits. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); *see also White v. Mitchell*, 431 F.3d 517, 526 (6th Cir. 2005) (exhaustion requirement does not limit federal court's jurisdiction).

by selecting a higher sentence because he exercised his jury trial right and his right not to admit guilt.

The district court denied Chontos's petition but granted him a certificate of appealability on the second claim, which this court expanded to include the first. Chontos timely appealed, and we affirm. We adopt the district court's sound reasoning on Chontos's second claim. As for his first claim, we apply de novo review[2] and discern no jury-trial-right violation because the judge – found facts did not increase Chontos's sentence beyond the statutory maximum for *Apprendi* purposes.

I.

Apprendi v. New Jersey's Sixth Amendment rule requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). The Supreme Court in *Blakely v. Washington* explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on*

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[2] Chontos says that AEDPA's deferential standard of review applies to his *Apprendi* claim. But he does not identify a state court decision adjudicating the merits of that claim, a prerequisite for AEDPA deference. *See* 28 U.S.C. § 2254(d). Although Chontos may concede more ground than the law requires, we bypass deciding whether AEDPA governs his *Apprendi* claim. Instead, we deny Chontos relief under a de novo standard. *See Rosencrantz v. Lafler*, 568 F.3d 577, 584 n. 3 (6th Cir. 2009).

the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. 296, 303 (2004). Under these cases, judicial factfinding may not increase the maximum penalty beyond that to which the jury's verdict alone exposes the defendant.

Chontos argues that the Michigan trial judge violated *Apprendi* by finding facts that raised his minimum sentence. But *Harris v. United States* tells us that *Apprendi*'s rule does not apply to judicial factfinding that increases a minimum sentence so long as the sentence does not exceed the applicable statutory maximum. 536 U.S. 545, 563-68 (2002) (plurality opinion); *id.* at 569-70 (Breyer, J., concurring); *accord United States v. Copeland,* 321 F.3d 582, 602 n. 5 (6th Cir. 2003).

By clarifying that minimum sentences fall outside *Apprendi*'s scope, *Harris* forecloses Chontos's claim. Chontos correctly observes that judge-found facts increased his guidelines range, and that his range – absent a finding of substantial and compelling reasons for a departure, Mich. Comp. Laws § 769.34(3) – required a minimum sentence between 135 and 225 months. Nevertheless, focusing on Chontos's minimum sentence misses *Apprendi*'s point. The Sixth Amendment jury trial right simply "ensure[s] that the defendant 'will never get *more* punishment than he bargained for when he did the crime'"; it does "not promise that he will receive 'anything less' than that." *Harris,* 536 U.S. at 566 (quoting *Apprendi,* 530 U.S. at 498 (Scalia, J., concurring)). When Chontos violated § 750.520b, he

bargained that, if a jury found him guilty, he could receive a maximum penalty of "any term of years." And regardless of the ways that judicial factfinding and Michigan's guidelines affected his minimum sentence, Chontos got no more than he bargained for. Chontos's sentence therefore survives Sixth Amendment scrutiny.[3]

A final point. Although the Sixth Amendment permits judicial factfinding in calculating Chontos's minimum sentence, the judge-found facts may not contradict the jury's verdict. *See United States v. Cockett,* 330 F.3d 706, 711 (6th Cir. 2003). Chontos maintains that relying on acquitted conduct to calculate his minimum sentence violates this rule. But *United States v. White* defeats that argument with its recognition that the differing standards of proof used by judges and juries accommodate the use of acquitted conduct in sentencing. 551 F.3d 381, 385 (2008) (en banc).

II.

Chontos next argues that the Michigan trial court violated his Fifth and Sixth Amendment rights by sentencing him more harshly for insisting on going

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[3] We have no occasion to address the constitutionality of guidelines calculations within the statutory category of "intermediate sentence." Mich. Comp. Laws § 769.34(4)(a). Chontos does not argue, and nothing suggests, that absent judge-found facts Chontos would have qualified for an intermediate sanction under § 769.34(4)(a).

to trial and for not explicitly admitting his guilt. Because our review of the record, the applicable law, and the parties' briefs convinces us that the district court properly rejected this claim, and because the district court's memorandum opinion carefully and correctly set out the facts and the governing law, we adopt as this court's opinion the reasoning supplied by part III, B of the district court's opinion. *Chontos v. Berghuis,* No. 06-13049, 2007 WL 4326840, *4-7 (E.D. Mich. Dec. 10, 2007).

III.

For these reasons, we affirm.

2007 WL 4326840 (E.D.Mich.)

United States District Court,
E.D. Michigan,
Southern Division.
Joseph Michael **CHONTOS**, Petitioner,
v.
Mary BERGHUIS, Respondent.
No. 06-13049.

Dec. 10, 2007.

Rosemary A. Gordon, Tucson, AZ, for Petitioner.

B. Eric Restuccia, Raina I. Korbakis, Michigan Department of Attorney General, Lansing, MI, for Respondent.

OPINION AND ORDER DENYING HABEAS CORPUS PETITION AND GRANTING IN PART A CERTIFICATE OF APPEALABILITY

VICTORIA A. ROBERTS, District Judge.

Petitioner Joseph Michael Chontos seeks the writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent argues in an answer to the Habeas Petition that Petitioner's claims are unexhausted, not cognizable, or without merit. The Court agrees that Petitioner's claims do not warrant granting the writ of habeas corpus. Accordingly, the Habeas Petition will be denied.

I. Background

On September 17, 2002, a circuit court jury in Wayne County, Michigan found Petitioner guilty of: two counts of first-degree criminal sexual conduct, Mich. Comp. Laws § 520b(1)(a); two counts of second-degree criminal sexual conduct, Mich. Comp. Laws § 520c(1) (a); and one count of exhibiting obscene matter to a minor, Mich. Comp. Laws § 722.675. The convictions arose from allegations that Petitioner sexually abused his young nephews. The trial court sentenced Petitioner to concurrent terms of imprisonment as follows: eighteen and three-quarters to forty years for the first-degree criminal sexual conduct; five to fifteen years for the second-degree criminal sexual conduct; and one to two years for exhibiting obscene material to a minor.

In an appeal of right, Petitioner argued that (1) the statute for exhibiting sexually explicit material to a minor was unconstitutional, (2) the trial court improperly considered the fact that he exercised his right to go to trial and refused to admit guilt, (3) the evidence was insufficient to sustain the conviction for exhibiting sexually explicit material to minors, and (4) the trial court abused its discretion by permitting the prosecutor to impeach a witness with extrinsic evidence of collateral matters. The Michigan Court of Appeals was unpersuaded by these arguments, and on July 29, 2004, it affirmed Petitioner's convictions and sentence. *See People v. Chontos,* Nos. 246799 and 246884, 2004 WL 1699070 (Mich.Ct.App. July 29, 2004) (unpublished). Petitioner moved for reconsideration

on the ground that his sentence must be vacated in light of the Supreme Court's recent decision in *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The state court of appeals denied reconsideration without discussion.

Petitioner then applied for leave to appeal in the Michigan Supreme Court where he alleged that (1) the trial court punished him for refusing to admit guilt and for going to trial, (2) the trial court violated the holding in *Blakely,* and (3) the evidence was insufficient to sustain his conviction for exhibiting sexually explicit material to minors. The Michigan Supreme Court denied leave to appeal on April 26, 2005, because it was not persuaded to review the issues. *See People v. Chontos,* 472 Mich. 895, 695 N.W.2d 72 (2005).

Petitioner filed his Habeas Corpus Petition through counsel on July 3, 2006. The grounds for relief read:

> I. The jury convicted Chontos of two penetrations. The state trial judge disagreed with the jury's verdict because she didn't think anyone who had sat through the trial could disbelieve the children. This led to the judge finding that Chontos perpetrated eleven penetrations, which raised Chontos's mandatory sentencing guideline score by 100 points, substantially increasing his sentences. The sentences Chontos received violated his Sixth Amendment right to a jury trial under

> the principles set forth in *Blakely v. Washington.*
>
> II. At sentencing the state trial judge expressed her belief that Chontos should have pled guilty rather than go to trial. She berated him for subjecting the complainants to the trauma of having to testify. And she chastised him for refusing to admit he was guilty. The judge sentenced Chontos to the highest possible sentence to punish him for refusing to admit guilt, a Fifth Amendment violation, and to punish him for going trial, a Sixth Amendment violation.

Respondent contends that Petitioner's *Blakely* claim is not exhausted or applicable, that Petitioner's arguments about the scoring of the sentencing guidelines is not cognizable on habeas review, and that Petitioner's second claim lacks merit. The Court need not decide whether Petitioner exhausted state remedies for all his claims or whether he has an available remedy to exhaust, because the exhaustion requirement is not a jurisdictional one. *White v. Mitchell,* 431 F.3d 517, 526 (6th Cir.2005), *cert. denied sub nom Houk v. White,* ___ U.S. ___, 127 S.Ct. 578, 166 L.Ed.2d 457 (2006), *and cert. denied sub nom White v. Houk,* ___ U.S. ___, 127 S.Ct. 581, 166 L.Ed.2d 434 (2006). The Court therefore will proceed to adjudicate the merits of Petitioner's claims, using the following standard of review.

II. Standard of Review

Petitioner is entitled to the writ of habeas corpus if he can show that the state court's adjudication of his claims on the merits –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court's decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (Justice O'Connor's majority opinion on Part II). A state court's decision is an "unreasonable application of" clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

"[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law."

Id. at 410 (emphasis in original). "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409.

When a state court fails to articulate a basis in federal law for rejecting a prisoner's federal claims, "deference is owed only to the result reached by the [state court], and not its reasoning, and this court must conduct an independent review of the record and the law to determine whether the state court's ruling comports with the requirements of § 2254(d)." *Stewart v. Erwin,* 503 F.3d 488, 492 (6th Cir.2007) (quotation marks and end citations omitted). Section "2254(d) dictates a highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Bell v. Cone,* 543 U.S. 447, 455, 125 S.Ct. 847, 160 L.Ed.2d 881 (2005) (quotation marks and citations omitted). "Furthermore, state findings of fact are presumed to be correct unless the defendant can rebut the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1)." *Baze v. Parker,* 371 F.3d 310, 318 (6th Cir.2004), *cert. denied,* 544 U.S. 931, 125 S.Ct. 1670, 161 L.Ed.2d 495 (2005).

III. Discussion

A. Judicial Fact Finding

The first habeas claim alleges that the trial court sentenced Petitioner for eleven sexual penetrations

even though the jury found Petitioner guilty of only two penetrations. This allegation is based on (1) the trial court's scoring of an offense variable for the number of penetrations and (2) the trial court's comment that no "person who sat through this trial, with an impartial mind towards the circumstances, could in any way disbelieve these children." Tr. Oct. 2, 2002, at 16-17. Petitioner contends that the trial court usurped the jury's duty to assess the witnesses' credibility and to determine the facts. According to Petitioner, the trial court made an independent finding of facts in violation of his Sixth Amendment right to a jury trial and contrary to the Supreme Court's decision in *Blakely*.

The United States Supreme Court "has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham v. California,* ___ U.S. ___, ___, 127 S.Ct. 856, 863-64, 166 L.Ed.2d 856 (2007). In other words, "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." *Id.* at 860. "[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely,* 542 U.S. at 303-04.

Petitioner's reliance on *Blakely* is misplaced because a majority of Supreme Court Justices in *Blakely* indicated that its decision applied only to determinate sentencing systems. *See id.* at 308-09. Michigan has an indeterminate sentencing system in which the minimum sentence generally is based on sentencing guidelines and the maximum sentence is set by law, not by the trial court. *People v. Claypool*, 470 Mich. 715, 730 n. 14, 684 N.W.2d 278, 286 n. 14 (2004). "[B]ecause a Michigan defendant is always subject to serving the maximum sentence provided for in the statute that he or she was found to have violated, that maximum sentence constitutes the 'statutory maximum' as set forth in *Blakely*." *People v. Drohan*, 475 Mich. 140, 163-64, 715 N.W.2d 778, 791 (2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 592, 166 L.Ed.2d 440 (2006).[1]

Petitioner's maximum sentence of forty years for first-degree criminal sexual conduct fell within the statutory maximum of life imprisonment. Mich. Comp. Laws § 750.520b(b). Furthermore, the

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[1] The Michigan Supreme Court recently reaffirmed its holding in *Drohan* that Michigan's indeterminate sentencing scheme is valid under *Blakely*. *See People v. Harper*, 479 Mich 599, 739 N.W.2d 523 (2007); *see also People v. McCuller*, 479 Mich. 672, 686, 739 N.W.2d 563, 571 (2007) (stating that the United States Supreme Court's decision in *Cunningham* does not require the Michigan Supreme Court to modify its decision in *Drohan* and that a sentencing court does not violate *Blakely* by engaging in judicial fact-finding to score the recommended minimum sentence range).

Michigan Supreme Court's interpretation of state law binds this Court on habeas review. *Bradshaw v. Richey,* 546 U.S. 74, 76, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005); *Miskel v. Karnes,* 397 F.3d 446, 453 (6th Cir.2005). The Court concludes that Petitioner's sentence did not implicate *Blakely* and that his *Blakely* claim lacks merit. *See Tironi v. Birkett,* No. 06-1557, 2007 WL 3226198 (6th Cir. Oct.26, 2007) (unpublished) (affirming the District Court's conclusion that Tironi's sentence did not violate *Blakely* because *Blakely* does not apply to Michigan's indeterminate sentencing scheme).

B. Alleged Punishment for Exercising Constitutional Rights

Petitioner's second and final claim alleges that the trial court sentenced Petitioner to the highest possible sentence because Petitioner exercised his Sixth Amendment right to go to trial and his Fifth Amendment right not to admit that he was guilty. The Michigan Court of Appeals considered only Petitioner's Sixth Amendment claim. It determined that

> rather than chastising defendant for going to trial, as defendant suggests, the trial court is actually addressing directly the multiple statements made by defendant's family members pleading with the court that defendant did not commit the crime and responding to defendant's claim that he has suffered because of the charges and trial. The trial court's statement expresses to defendant

> that he brought it about himself and that suffering through the process is not a basis for leniency.

Chontos, 2004 WL 1699070, at *3. The court of appeals concluded that "taken as a whole, there is simply no evidence that the trial court sentenced defendant more harshly based on the exercise of his constitutional right to a jury trial." *Id.*

1. Fifth and Sixth Amendment Rights

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. The Amendment is applicable to the states through the Fourteenth Amendment. *Estelle v. Smith,* 451 U.S. 454, 462, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). "The essence of this basic constitutional principle is 'the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" *Id.* (emphasis in original) (quoting *Culombe v. Connecticut,* 367 U.S. 568, 581-82, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961)). "Any effort by the State to compel [the defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment." *Id.* at 463. This rule applies to capital sentencing cases, *see id.,* as well as noncapital sentencing proceedings. *Mitchell v. United States,* 526 U.S. 314, 326, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999).

The Fifth Amendment privilege to remain silent "is fulfilled only when a criminal defendant is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.'" *Estelle v. Smith,* 451 U.S. at 468 (quoting *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)). And no adverse inference from a defendant's silence may be made at sentencing. *Mitchell v. United States,* 526 U.S. at 327-30. "By holding [a defendant's] silence against [him or] her in determining the facts of the offense at the sentencing hearing, [a court] impose[s] an impermissible burden on the exercise of the constitutional right against compelled self-incrimination." *Id.* at 330. A defendant also may not be punished for exercising the Sixth Amendment right to a jury trial. *United States v. Jackson,* 390 U.S. 570, 581, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968); *United States v. Medina-Cervantes,* 690 F.2d 715, 716 (9th Cir.1982).

2. The Trial Court's Comments

Petitioner asserts that the trial court punished him for refusing to admit guilt. The record, however, indicates that the trial court commented about Petitioner's failure to *deny* guilt. After noting that Petitioner had not expressed any concern for the victims, the trial court said: "Nor do you, as some of your family members do, deny committing this crime." Tr. Oct. 2, 2002, at 17. Thus, according to the trial court, Petitioner implicitly conceded guilt by not denying that he committed the crimes.

On the other hand, the court also stated that it had encouraged spending time on a resolution of the case, so that the family could have the best outcome. *See id.* The court then said:

> And what's really sad is how close this case came to a resolution. Many of your family members don't know, but you know, this wasn't going to be a no contest plea; this would a guilty plea. And it was 2 years of disagreement. And we are talking about how this effects you, and no one on this side is talking about how this effects the victims in the case.
>
> . . . .
>
> You made a choice to bring this to a jury, to bring these two boys to testify, and the jury came back with a verdict.

Id. at 17-18.

After the trial court sentenced Petitioner, defense counsel pointed out that, if there had been a plea, it would have been a no-contest plea, not a guilty plea. The trial court responded by stating that it would not have accepted a no-contest plea. The court went on to say:

> [T]hat did not result. What resulted is that these children had to go through a trial and testify. The jury found the verdict, and this court must sentence comporting with that verdict.

> The humiliation that was had was not on the part of the defendant who had to sit there; but on the part of the boys who had to extensively, hour after hour, testify about these things. And so the jury had the verdict, and there is the sentence.

Id. at 20-21.

3. Analysis

The trial court's comments must be viewed in their context. Prior to making the comments, the trial court heard from Petitioner's relatives, some of whom said that the sexual conduct was consensual, that the complainants and their mother lied, that Petitioner did not commit the crimes, and that Petitioner was a good and caring young man. *Id.* at 13-16.

Petitioner apologized "for all the pain [his] family ha[d] gone through." He said, "This has been a struggle. It has hurt everyone." *Id.* at 16. He then pleaded with the trial court not to send him to prison. He stated that jail was destroying him, that he was a good person, and that he needed to be with his family.

The trial court responded to Petitioner's remarks by stating that Petitioner had chosen to go to trial, that the court could not disregard the jury's verdict, and that probation was not a realistic option. The court also stated that sexually assaulting a child was clearly enough to destroy a persons's life and that, "the court's only concern has to be towards the victims in the case." The court concluded that it could

only sentence Petitioner to an appropriate sentence under the sentencing guidelines. *Id.* at 17-19.

The trial court's comments may have been intended to convey to Petitioner and his family that Petitioner could have had a lenient sentence had he accepted the prosecutor's offer to plead guilty or no-contest to third-degree criminal sexual conduct with a sentence of six to fifteen years. *See* Tr. Sept. 11, 2002, at 3. The court arguably was saying that, in light of the jury's verdict and Petitioner's rejection of the plea offer, the court was required to sentence Petitioner under the sentencing guidelines, which were less favorable to him.

The trial court's expression of sympathy for the victims and its consideration of Petitioner's moral culpability were natural reactions to the evidence adduced at trial and raises no constitutional concern. *Baston v. Bagley,* 420 F.3d 632, 638 (6th Cir.2005) (citing *Liteky v. United States,* 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994)), *cert. denied,* ___ U.S. ___, 126 S.Ct. 2294 (2006). "[T]he court could not realistically be expected to expunge from its mind the evidence presented at trial," and its acknowledgment of the impact of the evidence presented at trial did not violate the Constitution. *Roussell v. Jeane,* 842 F.2d 1512, 1524 (5th Cir.1988) (quoting *United States v. Campbell,* 684 F.2d 141, 184 (D.C.Cir.1982)).

The trial court's "articulation of additional factors for the sentence imposed . . . [also] lessens any concern . . . that [Petitioner's] sentence was based upon

an improper assumption." *United States v. Santamaria,* 788 F.3d 824, 828 (1st Cir.1986). The additional factors considered were the unlikelihood that Petitioner could be rehabilitated and the fact that, in the court's mind, Petitioner was a dangerous predator. Tr. Oct. 2, 2002, at 19.

If Petitioner had been filled with remorse and had admitted his crimes, it is possible he would have received a reduced sentence, because "those who admit their guilt are often less threatening to society." *United States v. McClain,* 2 F.3d 205, 207 (7th Cir.1993). "[T]his does not mean that he was punished for maintaining his innocence in any way that the Constitution recognizes." *Id.* The failure to show remorse is a relevant factor for courts to consider when determining the appropriate sentence because "[a] contrite defendant is considered to be more likely to benefit from rehabilitation and is, therefore, more deserving of leniency in sentencing." *El v. Artuz,* 105 F.Supp.2d 242, 255 (S.D.N.Y.2000).

4. *Ketchings v. Jackson*

The United States Court of Appeals for the Sixth Circuit has granted habeas relief in a case similar to this one. *See Ketchings v. Jackson,* 365 F.3d 509 (6th Cir.2004). Ketchings was sentenced to almost twice the maximum recommended under the Michigan sentencing guidelines for second-degree murder. He argued on appeal from his conviction and sentence that the trial court improperly considered his failure

to admit guilt at sentencing. The Michigan Court of Appeals stated that the sentencing judge was merely addressing remorsefulness in the context of Ketchings' rehabilitative potential and avoidance of responsibility for his actions. The state court of appeals concluded that Ketchings' sentence was not improperly influenced by his failure to admit guilt or by a desire to punish Ketchings for exercising his constitutional right to maintain his innocence.

Ketchings raised the same issue in a federal habeas corpus petition, which the District Court granted. The Court of Appeals for the Sixth Circuit affirmed the District Court's decision. It agreed with Ketchings that his sentence was imposed in violation of his Fifth Amendment right against self-incrimination. The Court of Appeals opined that the Michigan Court of Appeals had not merely addressed remorsefulness in the context of Petitioner's rehabilitative potential, but had criticized Ketchings for his failure to admit guilt even though Ketchings made a lengthy statement expressing his remorse.

Petitioner's case is distinguishable from *Ketchings*. Unlike Ketchings, Petitioner did not assert a claim of innocence at sentencing, and he also did not make a lengthy statement of remorse. He made a short apology to his own family and asked not to be sent to prison. Furthermore, the trial court did not opine that Petitioner could not be rehabilitated until he acknowledged that he did something wrong. Instead, the trial court stated that, in light of the entire

situation and the circumstances, the hope of rehabilitation was "very small."

It is also noteworthy that the trial court sentenced Petitioner within the state sentencing guidelines, unlike Ketchings' sentencing judge, who exceeded the guidelines and imposed a sentence almost twice as much as the recommended sentencing guidelines. "As long as the sentence remains within the statutory limits, trial courts have historically been given wide discretion in determining 'the type and extent of punishment for convicted defendants.'" *Austin v. Jackson,* 213 F.3d 298, 231 (6th Cir.2000) (quoting *Williams v. New York,* 337 U.S. 241, 245, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)). The Court concludes that the trial court did not punish Petitioner for going to trial or for not explicitly admitting guilt.

IV. Conclusion

The state appellate court's findings did not result in an unreasonable determination of the facts, and its conclusions were not contrary to, or an unreasonable application of, Supreme Court precedent. Accordingly, the Petition for a Writ of Habeas Corpus is DENIED. However, because reasonable jurists could find the Court's assessment of Petitioner's second claim to be debatable, the Court GRANTS a certificate of appealability as to Claim II. The Court DECLINES to issue a certificate of appealability on Petitioner's first claim.

Nos. 08-1031

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH CHONTOS, Petitioner-Appellant, v. MARY BERGHUIS, Respondent-Appellee.	)	ORDER (Filed Jan. 12, 2010)

BEFORE: BATCHELDER, Chief Judge; BOGGS and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

Michigan Sentencing Guidelines

OV 11 Criminal Sexual Penetration		
Pts		**Instructions**
50	Two or more criminal sexual penetrations occurred. MCL 777.41(1)(a)	• All sexual penetrations of the victim by the offender arising out of the sentencing offense must be counted in scoring OV 11. MCL 777.41(2)(a). • Multiple sexual penetrations of the victim by the offender occurring beyond the sentencing offense may be scored in OVs 12 or 13.* MCL 777.41(2)(b). However, if any conduct is scored under this variable, that conduct must not be scored under OV 12 and may only be scored under OV 13 if the conduct is related to the offender's membership in an organized criminal group. MCL 777.42(2)(c); MCL 777.43(2)(c). • The one penetration on which a first- or third-degree criminal sexual conduct offense is based must not be
25	One criminal sexual penetration occurred. MCL 777.41(1)(b).	
0	No criminal sexual penetrations occurred. MCL 777.41(1)(c).	

		counted for purposes of scoring OV 11. MCL 777.41(2)(c). * *OV 12 addresses criminal acts that occur within 24 hours of the sentencing offense and will not result in a separate conviction. OV 13 accounts for an offender's pattern of criminal conduct over a period of five years regardless of outcome.*

OV 13
Continuing Pattern of Criminal Behavior

Effective March 1, 2003, 2002 PA 686 amended the instructions for OV 13 to include references to specific controlled substance offenses. Language appearing in bold type in the chart below applies to offenses committed on or after March 1, 2003, pursuant to 2002 PA 666

Pts		Instructions
50	The offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age. MCL 777.43(1)(a).	• To score this variable, all crimes within a period of five years, including the sentencing offense, must be counted without regard to whether the offense resulted in a conviction. MCL 777.43(2)(a).

25	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. MCL 777.43(1)(b).	• The existence of an organized criminal group may be inferred from the facts surrounding the sentencing offense, and the group's existence is more important than the presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication demonstrated by the criminal group. MCL 777.43(2)(b). • Do not consider conduct scored in OVs 11 or 12 unless the offense was related to membership in an organized criminal group. MCL 777.43(2)(c). • Score 50 points only if the sentencing offense is first-degree criminal sexual conduct. MCL 777.43(2)(d). • Only one controlled substance offense arising from the criminal episode for which the offender is being sentenced may be counted when scoring this variable.* MCL 777.43(2)(e).
10	The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property **or a violation of MCL 333.7401(2)(a)(i) to (iii) or 333.7403(2)(a)(i) to (iii), MCL 777.43(1)(c).**	
10	The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group. MCL 777.43(1)(d).	
10	**The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more**	

	violations of MCL 333.7401(2)(a)(i) to (iii) or 333.7403(2)(a)(i) to (iii). MCL 777.43(1)(e).	• Only one crime involving the same controlled substance may be counted under this variable.* For example, conspiracy and a substantive offense involving the same amount of controlled substances cannot both be counted under OV 13. Similarly, possession and delivery of the same amount of controlled substances may not be counted as two crimes under OV 13. MCL 777.43(2)(f). **Effective March 1, 2003, 2002 PA 666*
5	The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property. MCL 777.43(1)(f).	
0	No pattern of felonious criminal activity existed. MCL 777.43(1)(g).	

STATE OF MICHIGAN

THE THIRD JUDICIAL CIRCUIT COURT –
(WAYNE COUNTY)

PEOPLE OF THE STATE
OF MICHIGAN,

vs.

JOSEPH MICHAEL
CHONTOS,

DEFENDANT. /

CIRCUIT COURT NO.
02-7853
02-9913

SENTENCE

BEFORE THE HONORABLE
PATRICIA S. FRESARD, CIRCUIT JUDGE

DETROIT, MICHIGAN – OCTOBER 2, 2002

(Filed July 6, 2006)

APPEARANCES:

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OFFICIAL COURT REPORTER
(313) 224-2455

DETROIT, MICHIGAN

OCTOBER 2, 2002

* * *

[3] THE CLERK: THIS IS CASE NUMBER 02-7853, CASE NUMBER 02-9913, PEOPLE VERSUS JOSEPH CHONTOS. THIS MATTER IS HERE TODAY FOR SENTENCING.

MR. ELIZONDO: GOOD MORNING. RALPH ELIZONDO ON BEHALF OF THE PEOPLE.

MR. FERGUSON: GOOD MORNING. GENE FERGUSON ON BEHALF OF DEFENDANT JOSEPH CHONTOS.

THE COURT: GOOD MORNING.

MR. FERGUSON: YES, YOUR HONOR. I REVIEWED THE – DID YOU WANT TO GO OVER GUIDELINES FIRST?

MR. ELIZONDO: AS FAR AS THE PRE-SENTENCE REPORT, YES. I REVIEWED IT ALL. I DID NOT HAVE ANY ADDITIONS OR CORRECTIONS. I WILL LEAVE THAT UP TO COUNSEL, AS TO SPECIFICS, JUST THE PRE-SENTENCE REPORT.

MR. FERGUSON: OKAY.

YOUR HONOR, I HAVE GONE OVER THE GUIDELINES WITH MR. ELIZONDO. I THINK WE HAVE AGREED AS TO BOTH THE CASES, THAT NUMBER 12 – OFFENSE VARIABLE 12 SHOULD BE ELIMINATED. THAT SCORE SHOULD BE ZERO, BECAUSE THESE OFFENSES DID NOT HAPPEN WITHIN 24 HOURS.

THE COURT: COUNSEL, YOU'RE FACING – I CAN'T HEAR WHAT YOU ARE SAYING, AT ALL.

[4] MR. FERGUSON: AS TO OFFENSE VARIABLE 12 –

THE COURT: YES.

MR. FERGUSON: – IT WAS SCORED 25 POINTS ON BOTH VICTIMS. I BELIEVE WE HAVE A 5 GRADE; THAT SHOULD BE ZERO, AS THESE OFFENSES DID NOT HAPPEN WITHIN 24 HOURS.

MR. ELIZONDO: ALL RIGHT.

THE COURT: ALL RIGHT.

MR. FERGUSON: AS TO DOCKET NUMBER 02-9913, WHICH IS AS TO THE VICTIM MARCUS CHONTOS, OFFENSE VARIABLE 11, 50 WAS SCORED FOR 2 OR MORE PENETRATIONS OCCURRING. I WOULD ARGUE THAT SHOULD BE ZERO AS TO VICTIM MARCUS CHONTOS. THERE ARE NO CONVICTIONS AS TO PENETRATION. I BELIEVE THAT SHOULD BE ZERO. I DON'T

BELIEVE THE PROSECUTOR AGREES WITH THAT. AGAIN, I THINK THAT SHOULD BE SCORED AS ZERO.

THE COURT: IF THIS IS ARGUMENT ON SOMETHING WE HAVE TO HEAR BOTH SIDES.

MR. FERGUSON: I UNDERSTAND.

THE COURT: THE ISSUE ON THAT IS?

MR. FERGUSON: HE WAS NOT CONVICTED OF ANY PENETRATION AS TO MARCUS CHONTOS.

MR. ELIZONDO: MY POSITION, JUDGE, IS SIMPLY WHETHER OR THE NOT HE IS CONVICTED DOESN'T REALLY MATTER. WHAT MATTERS IS WHETHER THE COURT AFTER [5] HEARING THE TESTIMONY HERE, BELIEVES BY A PREPONDERANCE OF THE EVIDENCE THAT THERE WAS SUFFICIENT EVIDENCE FOR THIS COURT TO FIND THAT THERE WERE TWO OR MORE PENETRATIONS, AS TO THAT PARTICULAR INDIVIDUAL.

I AM AT A DISADVANTAGE. I WAS NOT HERE FOR THE TRIAL. I TALKED WITH MR. LESS. MR. LESS INDICATED TO ME THAT THERE WAS – THERE HAD BEEN TESTIMONY BY THE COMPLAINANT IN THAT PARTICULAR MATTER, ALLEGING THE PENETRATIONS.

AS FAR AS CREDIBILITY AND THAT SORT OF THING, I LEAVE THAT UP TO THE COURT. IT IS

OUR POSITION THAT IT WAS THERE; EVEN IF THE JURY DID FIND HIM NOT GUILTY ON IT; IT WOULD BE UP TO THE COURT TO FIND BY A PREPONDERANCE OF THE EVIDENCE THAT, IN FACT, THERE WAS ENOUGH EVIDENCE TO SUSTAIN TWO OR MORE PENETRATIONS.

THE COURT: AND THAT IS HOW MANY POINTS?

MR. FERGUSON: FIFTY.

THE COURT: THE COURT DID HEAR THIS CASE, HAD SAT THROUGH THE ENTIRE TRIAL, AND ALSO TALKED TO THE JURY ABOUT THEIR ASSESSMENT. AND THEIR REASONS AND THE COURT WOULD FIND THAT THESE 50 POINTS SHOULD BE ASSESSED IN THIS MATTER.

MR. ELIZONDO: COUNSEL, THE LAST THING, JUDGE, BEFORE WE DO ANYTHING ELSE, ANYTHING ELSE WE DID ADDRESS THE PRE-SENTENCE REPORT, AND I DID INDICATE THE [6] PEOPLE HAD NO ADDITIONS OR CORRECTIONS. I THINK IT WOULD UP TO COUNSEL AT THIS POINT, AT LEAST, TO COMMENT AS TO THE PRE-SENTENCE REPORT.

THE COURT: BEFORE WE DO THAT, EVEN, I WANT TO SEE IF GIVEN ANY CHANGES IN THE NUMBERS THERE ARE ANY DIFFERENCES IN THE GUIDELINES, WHATSOEVER; OR

IF THE GUIDELINES ARE 135 TO 225, ON THE CRIMINAL SEXUAL CONDUCT FIRST DEGREE.

IS THERE ANY CHANGE?

MR. FERGUSON: IT IS MY UNDERSTANDING THESE CHANGES WOULD NOT MAKE ANY CHANGES AS TO THE ULTIMATE GUIDELINES.

MR. ELIZONDO: YOUR HONOR, AS TO TOTAL OFFENSE VARIABLE THEY SCORED 155. IF WE SUBTRACT THE 25 FOR OFFENSE 12, THAT WE AGREED TO, THAT TOTAL WOULD LEAVE 130. THAT WOULD BE THE APPROPRIATE NUMBER. THAT WILL NOT CHANGE THE GUIDELINES, THOUGH. HE IS STILL A C-6.

THE COURT: ALL RIGHT. NOW AT THIS POINT, COUNSEL, HAVE YOU HAD THE OPPORTUNITY TO REVIEW THE PRE-SENTENCE REPORT WITH YOUR CLIENT AND IF SO, ARE THERE ANY ADDITIONS, DELETIONS OR CHANGES YOU WISH TO MAKE IN ANY WAY IN THE CONTENT OF THE REPORT?

MR. FERGUSON: YES, YOUR HONOR. TURNING FIRST TO CORRECTIONS, FIRST CORRECTION I MAKE IS [7] DEFENDANT DOES HAVE APPROXIMATELY TWO YEARS IN COLLEGE. IT INDICATES THAT HE HAS A HIGH SCHOOL EDUCATION. LATER IN THE REPORT IT DOES TALK ABOUT HIM HAVING SOME COLLEGE.

THE REPORT INDICATES HE HAS NO CLOSE FRIENDS. I HAVE SPOKEN TO HIM AND HIS FAMILY, AND THEY TELL ME HE HAS AT LEAST 2 CLOSE FRIENDS, OTHER THAN FAMILY MEMBERS. AT ONE POINT IT INDICATES HE IS NOT CURRENTLY ON MEDICATION. HE IS CURRENTLY ON MEDICATION FOR DEPRESSION ALTHOUGH IT SAYS THAT LATER IN THE REPORT, ALSO.

THERE IS A COMMENT THAT THESE PARTICULAR CRIMES WERE HIGHLY ASSAULTIVE. I DON'T SAY THIS TO MINIMIZE WHAT THESE CONVICTIONS ARE. HOWEVER, I THINK THE TESTIMONY WAS BASICALLY THAT IT WAS CONSENSUAL. BUT AGAIN, I'M JUST MENTIONING THAT BRIEFLY.

THE REPORT IS ALSO INCONSISTENT; AT ONE POINT IT INDICATES THE VICTIMS ARE DOING WELL, AND AT ONE POINT IT INDICATES THE VICTIMS ARE HAVING SOME PROBLEMS. I THINK THERE IS SOMEWHAT OF AN INCONSISTENCY THERE.

RELATIVE TO THE VICTIM MARCUS, I WANT TO AT LEAST PLACE ON THE RECORD THE FACT THAT HIS FULL ACCOUNT IS INCLUDED. THAT SEEMED TO BE PRETTY MUCH WHAT THE POLICE REPORT HAD SAID. DESPITE, THE FACT [8] THAT THE DEFENDANT WAS FOUND NOT GUILTY OF FOUR OF THE CHARGES AS TO

MARCUS. THAT WAS EVEN MORE TRUE; MARCUS' FULL ACCOUNT WAS INCLUDED, DESPITE THE FACT HE WAS FOUND NOT GUILTY ON 5 OF 6 CHARGES.

I ASK WHATEVER SENTENCE BE IMPOSED BY THIS COURT TODAY, THAT IT BE CONCURRENT AND NOT CONSECUTIVE.

YOUR HONOR, I HAD PROVIDED TO THE COURT A SERIES OF LETTERS FROM FAMILY MEMBERS. DID THE COURT RECEIVE THOSE?

THE COURT: YES.

MR. FERGUSON: DID YOU REVIEW THOSE?

THE COURT: YES.

MR. FERGUSON: THANK YOU, VERY MUCH.

YOUR HONOR, THE DEFENDANT IS HERE IS 25 YEARS OLD. HE HAS NO PRIOR RECORD. HE FINISHED HIGH SCHOOL WITH GOOD GRADES AND ATTENDED TWO YEARS OF COLLEGE. HE HAS BEEN WORKING IN THE FAMILY BUSINESS FOR 10 YEARS. HE HAS DONE VERY WELL. HE IS VERY MUCH AN ASSET TO THE FAMILY BUSINESS. HE VERY MUCH IS AN ASSET TO HIS PARENTS, WHO ARE SOMEWHAT OLDER IN AGE. HE DOES A LOT OF HEAVY WORK AT THE BUSINESS.

HE HAS MADE MAJOR CHANGES IN HIS LIFE. HE HAS CHANGED, RECENTLY LOSING OVER 175 POUNDS. HE STARTED BACK TO CHURCH; BACK THIS PAST APRIL. HE IS CURRENTLY IN A PRAYER GROUP, WHILE JAILED.

[9] HE HAS NO PRIOR RECORD. HE HAS BEEN PUT ON MEDICATION WHILE HE WAS LOCKED UP FOR SEVERE DEPRESSION. HIS EXTENDED FAMILY MEMBERS, AS IS EVIDENCED IN THE LETTERS, HAVE VERY MUCH SUPPORTED HIM IN HIS LIFE. THEY WILL CONTINUE TO SUPPORT HIM. OBVIOUSLY THEY HAVE BEEN HIGHLY DISTURBED BY THIS ENTIRE SITUATION, AS HE HAS BEEN.

IT IS A TRUE TRAGEDY FOR EVERYBODY. THIS IS A SITUATION WHERE THE DEFENDANT WAS A PRODUCTIVE PERSON. HE HAD NO PRIOR RECORD. I ASK THE COURT TO KEEP THIS IN MIND WHEN SENTENCING HIM TODAY.

THANK YOU.

THE COURT: ANYTHING ON BEHALF OF THE PEOPLE?

MR. ELIZONDO: YOUR HONOR, I DO HAVE COMMENTS. I WOULD ASK THE COURT IF I COULD RESERVE THOSE. JUDGE, THE FAMILY MEMBERS ARE HERE AND WISH TO ADDRESS THE COURT. OFTEN TIMES AFTER THEY GET DONE SPEAKING, IT TENDS TO MINIMIZE WHAT I NEED TO SAY AT THAT POINT.

THE COURT: ALL RIGHT.

MR. ELIZONDO: COULD I HAVE FAMILY MEMBERS APPROACH, JUDGE?

THE COURT: PLEASE.

MR. FERGUSON: I SHOULD ALSO STATE I HAD AT LEAST ONE FAMILY MEMBER WHO WANTS TO ADDRESS THE COURT, [10] ALSO.

THE COURT: ALL RIGHT.

MR. MICHAEL CHONTOS: MY NAMES IS MICHAEL CHONTOS. I FEEL THAT JOSEPH CHONTOS SHOULD SPEND THE REST OF HIS LIFE IN PRISON. I THINK WHAT HE DID TO MY BROTHER AND I IS EXTREMELY WRONG.

HE DID SOMETHING WRONG, AND I LEARNED WHEN YOU DO SOMETHING WRONG YOU MUST BE PUNISHED FOR IT. I FEAR MY TWO YEAR OLD BROTHER THAT LIVES WITH MY FATHER COULD BE IN HARM, IF JOSEPH IS NOT PUT IN PRISON. ALSO, HE COULD DO THIS TO ANOTHER OR MORE CHILDREN. SO I BELIEVE HE SHOULD BE PUNISHED TO THE EXTREME EXTENT.

THANK YOU.

THE COURT: THANK YOU.

MS. CHONTOS: MY NAME IS BETHANY DENISE CHONTOS. I AM READING THIS FOR MARCUS CHONTOS.

THE COURT: ALL RIGHT.

[MS. CHONTOS]: I WANT JOSEPH TO GO TO PRISON BECAUSE WHAT HE DID TO ME WAS WRONG, AND IT HURT ME BAD. WHAT HE DID WAS A CRIME AND THE LAW SAYS WHEN YOU COMMIT A CRIME, YOU HAVE TO BE PUNISHED. I DO NOT WANT TO SEE HIM UNTIL I AM AN ADULT. BECAUSE OF WHAT JOSEPH HAS DONE, MY FATHER AND HIS FAMILY HAS TURNED AGAINST ME AND MY SIBLINGS. BECAUSE OF WHAT JOSEPH HAS DONE TO ME AND MY BROTHER, WE DON'T GET TO SEE OUR HALF [11] BROTHER. IF IT HAPPENS TO HIM, MY FATHER WON'T REPORT IT, AND ALL OF US WORRY ABOUT THAT; IF JOSEPH IS NOT PUT IN PRISON. OKAY.

THE COURT: ALL RIGHT.

MS. KELLER: I'M BRIDGET KELLER, MICHAEL AND MARCUS' MOM.

WHAT JOSEPH DID WAS EVIL. HE TOOK AWAY THE RIGHT OF A HAPPY AND SAFE CHILDHOOD. HE HAS STOLEN THEIR INNOCENCE.

WHAT YOU HAVE DID TO MICHAEL AND MARCUS, THEY WILL HAVE TO LIVE WITH THE REST OF THEIR LIVES; AND JOSEPH SHOULD HAVE TO PAY FOR THE REST OF HIS.

ONCE A PEDOPHILE ALWAYS A PEDOPHILE. AND ANY MERCY FROM THIS COURT WOULD PUT OTHER CHILDREN IN DANGER OF ALSO LOSING THEIR INNOCENCE; ESPECIALLY MICHAEL AND MARCUS' T WO AND A HALF YEAR OLD HALF BROTHER, WHOSE PARENTS STILL DO NOT BELIEVE THIS HAS HAPPENED. HE WOULD MOST LIKELY ALLOW JOSEPH TO BE WITH HIM.

MICHAEL AND MARCUS' MATERNAL SIDE OF THE FAMILY WILL MAKE SURE THAT THIS EVIL DONE TO THEM, THEY WILL TURN IT AND MAKE SURE THEY NEVER BECOME WHAT HE IS THROUGH COUNSELLING, AND FAMILY SUPPORT. I FEEL JOSEPH SHOULD RECEIVE THE MAXIMUM SENTENCE BECAUSE HE IS A MAJOR TIIREAT TO SOCIETY AND TO HIS OWN FAMILY.

[12] THANK YOU.

THE COURT: THANK YOU.

MR. ELIZONDO: YOUR HONOR, THE ONLY THINGS THAT I WANT TO SAY ARE THESE: JUDGE, I BEEN DOING THESE CASES NOW ABOUT ALMOST 15 YEARS. AND EVERY TIME I COME TO SPEAK AT A SENTENCE LIKE THIS, WE HAVE THE VICTIMS COME UP AND ADDRESS THE COURT. BUT AS I LOOK OUT THERE, THERE IS A WIIOLE LOT MORE TIIAN JUST TWO PEOPLE. EVERY SINGLE PERSON WHO IS HERE IN SUPPORT OF THE DEFENDANT, IN FACT, IS A VICTIM IN THIS CASE.

WHAT WAS ONCE A HAPPY FAMILY, ONCE A FAMILY THAT WAS TOGETHER AND JUST LIKE YOU HEARD IT, IS SPLIT, BROKEN; BROKEN AND SPLIT BECAUSE OF THE ACTIONS OF ONE INDIVIDUAL.

THAT INDIVIDUAL IS THE PERSON WHO SITS UP HERE IN FRONT OF YOU TODAY TO BE SENTENCED. IT IS SPLIT. IT IS BROKEN. IT IS HURT. BECAUSE OF THE ACTIONS OF THAT ONE INDIVIDUAL.

I READ THE PRE-SENTENCE REPORT. IT SAYS NO REMORSE. NO REMORSE. NO ADMISSION. I GUESS A PERSON HAS A RIGHT TO ASSERT THEIR INNOCENCE. THAT IS ENTIRELY THEIR RIGHT. BUT UNTIL THERE IS ADMISSION THAT I DID SOMETHING WRONG, UNTIL THERE IS SOMETHING THAT INDICATES THERE WILL BE SOME REMORSE: I'M SORRY I DID THIS BAD THING. I'M SORRY. WHAT DID YOU DO? WHAT [13] CAN I DO FOR THEM? WHAT CAN I DO FOR MYSELF?

THAT PERSON IS A THREAT TO THE COMMUNITY, UNTIL THE PERSON COMES UP AND SAYS I'M SORRY, I'M GOING TO TAKE SOME STEPS. THAT PERSON IS A THREAT TO HIMSELF, TO FAMILY MEMBERS, AND ANYBODY ELSE THAT MAY COME INTO CONTACT WITH HIM.

THAT IS THE PEOPLE'S CONCERN, JUDGE, BASED ON ALL OF WHAT I KNOW ABOUT THIS

CASE, MY INVOLVEMENT IN THIS, AND BASED ON READING THE PRE-SENTENCE REPORT AND LISTENING AND SPEAKING WITH THE FAMILY; THOSE ARE MY CONCERNS.

YOUR HONOR, THE GUIDELINES RANGE IS BROAD. THE PEOPLE BELIEVE THAT BASED ON WHAT WE HEARD HERE, BASED ON EVERYTHING THAT HAS BEEN SAID, THAT THE SENTENCE SHOULD BE A THE TOP OF THE GUIDELINES, JUDGE.

THE COURT: THANK YOU.

MR. JOSEPH CHONTOS: I'M JOSEPH CHONTOS, FATHER OF JOE. I JUST WANT TO SAY HE HAS DONE EVERYTHING A CHILD SHOULD DO; GRADUATED FROM SCHOOL WITH A'S, WENT TO COLLEGE. HE IS JUST GOOD. HE WORKED AT THE STORE FOR 10 YEARS. HE HAS DONE MUCH BETTER THAN I WOULD. ON HIS SHIFT, EVERYBODY LOVES HIM. ALL THE CUSTOMERS LOVED HIM. THEY MISS HIM. WE MISS HIM. THERE IS NOTHING ELSE I CAN SAY.

THE COURT: ALL RIGHT.

[14] ANYONE ELSE?

MS. GAYLE OLIVER: YOUR HONOR, MY NAME IS GAYLE OLIVER. I AM THE MATERNAL AUNT OF JOSEPH CHONTOS. I HAVE KNOWN JOSEPH ALL OF HIS LIFE. I HAVE WATCHED HIM GROW PHYSICALLY AND MENTALLY AND OBSERVED HIS MATURITY.

YOUR HONOR, JOSEPH DOES NOT BELONG IN PRISON. HE HAS BEEN SLANDERED AND HUMILIATED AND HIS REPUTATION RUINED, JUST RUINED BY HIS NEPHEWS AND THEIR MOTHER. IT SICKENS ME. THE COURT NEEDS TO REALIZE JOSEPH IS A VERY SHY AND A VERY YOUNG 25 YEAR OLD. HE IS HONEST. HE IS NOT STREET SMART. I BELIEVE THAT HIS CHRONOLOGICAL AGE IS NOT THE SAME AS HIS MATURITY LEVEL. FOR THIS REASON PLEASE DON'T PUT HIM IN PRISON WITH ADULT CRIMINALS. PLEASE FIND A JUST AND FAIR SOLUTION TO THIS PROBLEM. PLEASE FIND SOME SORT OF HELP FOR JOSEPH AND HIS NEPHEWS.

I ALSO BELIEVE WHATEVER HAPPENED, IF SOMETHING HAPPENED BETWEEN THOSE BOYS, IT WAS MUTUAL AND IT WAS CONSENSUAL. I ALSO BELIEVE AND IT'S A KNOW FACT, THAT THESE BOYS AND THEIR MOTHER LIE.

THE COURT: THAT'S ENOUGH. THAT'S ENOUGH. THE JURY DECIDED THIS CASE AND WE ARE NOT GOING TO HAVE YOU MAKE THOSE TYPES OF COMMENTS.

ANYONE ELSE?

[15] MR. TIM CHONTOS: YOUR HONOR, I'M TIM CHONTOS, THE OLDER BROTHER. AND I WOULD LIKE TO SAY THAT JOSEPH HAS BEEN SPENDING A LOT OF TIME, BEFORE ALL THIS, WITH MY KIDS, AND I HAVE 6 KIDS. AND MY 16

YEAR OLD SPENDS ALL KINDS OF TIME WITH HIM. AND MY 16 YEAR OLD, WE HAVE ASKED ALL OF THEM, AND THEY ALL SAID – I DON'T BELIEVE HE'S ANY KIND OF PREDATOR. HE IS A GOOD GUY. I SEE HIM EVERY DAY WHEN I WAS AT LUNCH.

THANK YOU.

THE COURT: ANYONE ELSE?

MS. KAREN CHONTOS: GOOD MORNING. MY NAME IS KAREN CHONTOS, JOSEPH'S AUNT. I'M REALLY EMOTIONAL ABOUT THIS, BECAUSE I KNOW MY NEPHEW DIDN'T DO IT. AND I CAN'T HELP HIM. NONE OF US CAN HELP HIM. IF YOU KNEW JOSEPH, YOU WOULD KNOW HE DIDN'T DO IT. HE DIDN'T DO IT.

I CAN PUT MY LIFE DOWN AND TELL YOU. I DON'T KNOW WHAT TO SAY TO YOU. I KNOW IT'S ALREADY BEEN DONE, BUT JOSEPH DIDN'T DO IT.

THANK YOU.

THE COURT: THANK YOU.

ANYTHING ELSE?

MR. DEREK CHONTOS: YOUR HONOR, MY NAME IS DEREK CHONTOS. I'M THE BOYS' DAD. I'M ALSO THE DEFENDANT'S BROTHER. I LOVE ALL THREE OF THESE BOYS. [16] AND I CALL THEM BOYS. MY KIDS HAVE HAD TO GO

THROUGH SOMETHING THAT I WISH THEY WOULD NEVER HAVE TO GO THROUGH.

WHY I'M NOT IN THEIR LIFE ISN'T BECAUSE OF THIS; WHAT MY BROTHER DID OR DIDN'T DO, IF HE SHOULD BE PUNISHED FOR IT, I CAN ASSURE YOU THAT HE IS A VERY CARING YOUNG MAN AND I LOVE HIM. I WILL ASK GOD TO GUIDE YOU IN YOUR SENTENCING.

THANK YOU.

THE COURT: PLEASE STAND UP, MR. CHONTOS.

IS THERE ANYTHING YOU WOULD LIKE TO SAY BEFORE SENTENCE IS IMPOSED?

DEFENDANT: YES, YOUR HONOR. I WOULD LIKE TO SAY I'M SORRY FOR ALL THE PAIN MY FAMILY HAS GONE THROUGH. THIS HAS BEEN A STRUGGLE. IT HAS HURT EVERYONE. BECAUSE OF THIS, I'M CURRENTLY ON MEDICATION. AND IT'S NOT WORKING. BEING IN JAIL IS DESTROYING ME. I'M A GOOD PERSON. PLEASE DON'T SEND ME TO PRISON. I NEED TO BE WITH MY FAMILY.

THANK YOU.

THE COURT: ALL RIGHT. PLEASE BE SEATED.

THE COURT HAS REVIEWED THE PRESENTENCE REPORT ON THIS DEFENDANT'S BACKGROUND. THE COURT HAS ALSO SAT

THROUGH THE ENTIRE TRIAL, WHICH WAS LENGTHY. AND I DON'T BELIEVE THAT ANY PERSON WHO SAT THROUGH [17] THIS TRIAL, WITH AN IMPARTIAL MIND TOWARDS THE CIRCUMSTANCES, COULD IN ANY WAY DISBELIEVE THESE CHILDREN.

YOU, MR. CHONTOS, STAND UP AND TELL THIS COURT THAT YOU ARE A GOOD PERSON, AND HOW THIS EFFECTS YOU, AND HOW THIS IS HURTING YOU; WITH ABSOLUTELY NO CONCERN FOR THE VICTIMS IN THE CASE.

NOR DO YOU, AS SOME OF YOUR FAMILY MEMBERS DO, DENY COMMITTING THIS CRIME. IN FACT, YOU SAY HOW HARD THIS IS ON EVERYBODY. THIS IS SUCH A SAD CIRCUMSTANCE. BECAUSE THIS COURT ENCOURAGED TIME SPENT ON A RESOLUTION OF THE CASE, SO THAT THE FAMILY COULD ALL HAVE THE BEST OUTCOME. AND WHAT'S REALLY SAD IS HOW CLOSE THIS CASE CAME TO A RESOLUTION. MANY OF YOUR FAMILY MEMBERS DON'T KNOW, BUT YOU KNOW, THIS WASN'T GOING TO BE A NO CONTEST PLEA; THIS WOULD BE A GUILTY PLEA. AND IT WAS 2 YEARS OF DISAGREEMENT. AND WE ARE TALKING ABOUT HOW THIS EFFECTS YOU, AND NO ONE ON THIS SIDE IS TALKING ABOUT HOW THIS EFFECTS THE VICTIMS IN THE CASE.

IN FACT, THE STATEMENTS ARE NON-ASSAULTIVE, CONSENSUAL. THE LAW SAYS

THAT YOU DON'T HAVE SEX WITH A CHILD. A CHILD HAS NO LEGAL ABILITY TO CONSENT. AND TO TAKE A CHILD, STARTING AT SUCH A YOUNG AGE, WHETHER IT WAS 6 OR 7 OR 8, AND TO SEXUALLY ASSAULT HIM AS HE [18] IS GROWING INTO A TEENAGER, IS ENOUGH CLEARLY TO DESTROY A PERSON'S LIFE. AND AT THIS TIME, THE COURT'S ONLY CONCERN HAS TO BE TOWARDS THE VICTIMS IN THE CASE.

YOU MADE A CHOICE TO BRING THIS TO A JURY, TO BRING THESE TWO BOYS TO TESTIFY, AND THE JURY CAME BACK WITH A VERDICT. I WOULD HAVE TO FIND SUBSTANTIAL AND COMPELLING REASONS TO DEVIATE FROM THE GUIDELINES THAT WERE GIVEN OF 135 MONTHS TO 225 MONTHS ON THE MINIMUM. AND THE FAMILY WRITES ME AS IF I HAVE AN OPTION OF DISREGARDING THE JURY'S VERDICT OF GUILTY OF CRIMINAL SEXUAL CONDUCT, FIRST DEGREE, AND GIVING PROBATION. THAT'S NOT AN OPTION. THAT'S NOT A REALISTIC OPTION HERE.

AND FURTHER, RATHER THAN STATE WHAT YOUR OPINION IS, OR WHAT YOU WANT THE COURT TO KNOW AS FAR A SENTENCING, PEOPLE CAME FORWARD WITH WHAT CAN ONLY BE REGARDED AS INAPPROPRIATE STATEMENTS.

YOU DON'T KNOW WHAT HAPPENED TO THESE CHILDREN. AND YOU DO NOT HAVE THE RIGHT TO PUT ON THE RECORD THAT THE COURT SHOULD DISREGARD THE JURY'S VERDICT; WHICH THE COURT CANNOT DO.

YOU ALSO HAVE NO RIGHT TO CALL THIS CONSENSUAL. YOU HAVE NO RIGHT TO SAY HE DIDN'T DO IT. AND THE LETTERS JUST INDICATE THAT. EVEN THE LETTERS THAT ASSUME THAT HE DID DO THIS, STATE THAT – ONE [19] LETTER STATES HIS NEPHEWS, UNLIKE OTHERS, DIDN'T OSTRACIZE HIM. BUT ACCEPTED HIM UNCONDITIONALLY; BUT HE DIDN'T STALK ANYONE, HE DIDN'T PICK ON STRANGERS, SO HE IS NOT A PREDATOR.

YOU ARE A PREDATOR, AND YOU ARE DANGEROUS. AND TO THINK BECAUSE YOU PICKED ON YOUR OWN NEPHEWS RATHER THAN STRANGERS, YOU ARE NOT, IS A MISTAKE AND BECAUSE THE ENTIRE SITUATION, THE CIRCUMSTANCES, AND THE HOPE OF REHABILITATION IS VERY SMALL THE COURT CAN ONLY SENTENCE YOU ACCORDING TO THE GUIDELINES TO AN APPROPRIATE SENTENCE OF 225 MONTHS TO 40 YEARS IN PRISON ON COUNT 1, CRIMINAL SEXUAL CONDUCT, FIRST DEGREE, CONCURRENT; AND THE SAME SENTENCE ON COUNT 2, CRIMINAL SEXUAL ASSAULT, FIRST DEGREE; 5 TO 15 CONCURRENT, ON COUNT 3; 1 TO 2 CONCURRENT, ON COUNT 4; AND 5 TO 15 CURRENT, ON COUNT 5.

THE COURT IS GOING TO GIVE YOU A FORM AT THIS TIME. IF YOU WISH TO APPEAL THIS SENTENCE, YOU MAY DO SO WITHIN 42 DAYS OF TODAY'S SENTENCE DATE.

THE CLERK: CREDIT TIME?

THE COURT: THE COURT IS GOING TO GIVE YOU – THERE IS NO CREDIT TIME ON THE REPORT. HOW MANY DAYS DID HE SERVE?

MR. FERGUSON: HE SERVED – HE WAS IN WOODHAVEN JAIL FOR 3 DAYS, BEFORE THE CHARGES WERE [20] BROUGHT. I BELIEVE HE HAS BEEN IN JAIL SINCE SEPTEMBER 17TH; AND THEN HE WAS IN JAIL FOR – HOW MANY DAYS, WAS IT; 42 DAYS?

DEFENDANT: I BELIEVE SO.

MR. FERGUSON: FORTY-TWO DAYS. IT WAS 3 DAYS IN THE WOODHAVEN JAIL, 35 DAYS BEFORE HE POSTED BOND AND THEN HE HAS BEEN IN JAIL FOR 16 DAYS SINCE THEN; SO THAT'S A TOTAL OF 55 DAYS, I BELIEVE.

THE COURT: THE COURT WILL GIVE HIM CREDIT FOR 55 DAYS SERVED.

MR. FERGUSON: I WANT TO MAKE ONE POINT, FOR THE RECORD; WHEN WE TALKED ABOUT A PLEA ON THIS, IT WAS GOING TO BE A NO CONTEST PLEA; THAT WAS THE DISCUSSION.

THE COURT: THAT'S NOT WHAT THE COURT WOULD HAVE ACCEPTED IN THIS CASE. BECAUSE IT IS MY OPINION –

MR. FERGUSON: I'M JUST MAKING A RECORD.

THE COURT: THAT'S FINE. BUT WE WERE – THAT'S NOT WHAT THIS COURT WOULD HAVE ACCEPTED. BUT THAT'S FINE, FOR THE RECORD.

HOWEVER, THAT DID NOT RESULT. WHAT RESULTED IS THAT THESE CHILDREN HAD TO GO THROUGH A TRIAL AND TESTIFY. THE JURY FOUND THE VERDICT, AND THIS COURT MUST SENTENCE COMPORTING WITH THAT VERDICT.

THE HUMILIATION THAT WAS HAD WAS NOT ON THE [21] PART OF THE DEFENDANT WHO HAD TO SIT THERE; BUT ON THE PART OF THE BOYS WHO HAD TO EXTENSIVELY, HOUR AFTER HOUR, TESTIFY ABOUT THESE THINGS. AND SO THE JURY HAD THE VERDICT, AND THERE IS THE SENTENCE.

MR. FERGUSON: THANK YOU.

(HEARING CONCLUDED.)